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COMMENTS

A NEW LOOK AT THE COLLECTION AGENCY IN CALIFORNIA

By ELLIOTT LEIGHTON*

Background of the Collection Agency

The collection agency today occupies a particularly unique position in our professional and business society. The collector effectuates the entire spectrum of creditors rights without practicing law. The collector is the collection client of the attorney without being a creditor. He deals with a debtor with all of the powers of the creditor while having few of the rights.

Increasing common law and statutory regulation has created many negative precepts of conduct for the collector and his attorney, leaving pitifully few avenues couched in positive terms of what is allowable, or what is good practice. To the extent that some of the areas surrounding the practicing collector are cogent to the legal process, the writer wishes to re-examine some of the questionable relationships created and retravel some of the covered ground in the area of the collection agency practice.

The collector is too seldom thought of as part of an industry now grossing a quarter of a billion dollars yearly. The collection industry had its genesis in the person of the grocery clerk who, by way of supplementing his income, would collect other accounts on his delivery trips.

With the expansion of this early collection business came an extension of techniques and devices for the more difficult collections. Most were used to coerce the debtor into "getting the money up" without regard to how that could be done and little concern over the validity of the claim, the defenses due the debtor, or the debtors true financial capacity. "Embarrassment wagons," brightly painted vehicles prominently bearing the insignia of the local collector would be parked at the debtor's home for all to see. Sometimes the collector would knock on the door of the debtor's neighbor. When the neighbor answered the collector would obstreperously berate the neighbor for his non-payment of a bill, pretending to believe the neighbor was the debtor. When the "mistake" was called to his attention, he would excuse himself and repeat the performance to another neighbor. This device was soon noted for its effectiveness in eliciting payment.

The early collector was treated as an independent contractor. With a lucrative income from collecting money by asking in "the right way," the collection business attracted an element of practitioner not overly concerned with ethics nor unnecessarily concerned with the responsibilities of any trust of the principal's funds. Defalcation was not unknown. Most cases left the client sans collector, sans money, and sans any recourse by way of bond or surety.

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The early "client" or customer of the collector has been portrayed as a person eager to divest himself of the stigma of "getting money," but who was not above hiring one who promised the toughest collection treatment of the debtor. The "third party approach" was and still is one of the reasons collection agencies are utilized, however both the collector and his client have learned to expect other qualities from each other.

Growth of Reform and Regulation

For the most part, it has been the collection industry itself that has been responsible for reform and regulation; a "bootstrap operation" from a disorganized conglomeration of legalized freebooters to a well-organized, ethics-governed industry, performing a service daily to all levels of business and the professions and carrying the full burdens of fiduciary trust.¹ Of the forty-eight states allowing the collection agency to operate as a commercial entity,² most have laws requiring the bonding of the collector in favor of the client or the state. The amount of clients' money handled makes apparent the similarity to regulations affecting the trust company.

California has led the nation in this trend. Since 1927 the state has had a series of statutes covering collection agencies,³ specifically dealing with collection practices, ethical conduct, client relationships, bonding and licensing requirements of the agency and its employees.

The growth of the collection industry has been phenomenal in terms of dollars collected, number of agencies established, development of ethical standards and the socio-economic level of its practitioners. This growth has involved legal growing pains and has often raised unanswered questions that the conscience of custom has not yet soothed. We might allow the collector to borrow from the jargon of the psychoanalyst the query: "Who am I?" Examination of some aspects in the field suggests the question not be hastily answered. For the purpose of examination our outline will be:

The Collector-Client Relationship: What is the legal relationship between the collector and the "customer" providing him with the claims that are his stock in trade; what legal limitations are upon the parties in their mutual dealings; under what circumstances may the relationship be terminated?

The Collector-Debtor Relationship: What rights are given to the collector, and from what sources are the rights derived; what acts constitute an abuse of privilege; what remedies or instrumentalities are available to the collector.

¹ Most collectors are members of the American Collectors Association, the origins of which go back to 1927 to a trade conference in Oakland, California, of several Pacific Coast collectors. Today California is responsible for over 400 of the almost 2000 collection agencies that comprise the national organization. The efforts of the ACA have included establishment of suggested forwarding arrangements of bonded claims throughout the world, education in collection techniques for members, and bonding for the benefit of members.

² Alabama and Rhode Island still reserve collection of bad debts to attorneys.

³ CAL. BUS. & PROF. CODE ch. 8, §§ 6850 to 6956 inclusive, is herein referred to as "The Act." CAL. ADMIN. CODE ch. 7, tit. 16, §§ 601 to 636 inclusive, is herein referred to as the California Collection Agency Codes or "the code."

The Collector and his connection with the judicial process: What involvement in the legal process may the collector indulge; the collector and the "unauthorized practice of law" problem; bonding requirements; interest; claims against community property; the usury analogy; provisional and other remedies; Statute of Limitations; supplemental proceedings.

While much of the material herein is applicable generally to the field of creditor's rights, it must be pointed out that such material is prerequisite to any examination of the collector and the legal climate he exists in.

Collector-Client Relationship

Creation

Contrary to the American common law,⁴ California cases and codes construe an assignee for collection, including a collection agency, as a real party in interest who may maintain an action in his own name.⁵ Our statutes are couched in the language of assignment to the collector, at least of the legal title. In substance the collector is confined to the limitations and responsibilities of an agent and a fiduciary. Lest the collector be misled by the title of assignee and feel compelled to exercise such dominion over the chose in action as to compromise the claim, sue on it, or invest the proceeds, he is reminded of the limitations imposed by the "Collection Agency Code."⁶ The collector is robed in the fiduciary duties inherent in an agent for collection only.⁷ He may not purchase or acquire a claim for the purpose of instituting suit.⁸

Termination:

The assignor or client could, under the common law, terminate an *agency* not coupled with an interest. Collection agency custom has modified that somewhat in most states, and "the code" clarifies the rights of both

⁴ The general U.S. view is that a collector may not appear as a real party in interest. *People ex rel. Chicago Bar Ass'n v. Barasch*, 406 Ill. 253, 94 N.E.2d 148 (1950); *Bump v. Barnett*, 235 Iowa 308, 16 N.W.2d 579 (1944); *Bay County Bar Ass'n v. Finance System Inc.*, 345 Mich. 434, 76 N.W.2d 23 (1956).

⁵ *National Reserve Company v. Metropolitan Trust*, 17 Cal. 2d 827, 112 P.2d 598 (1941) (Assignment of chose in action vests legal title in the assignee, regardless of consideration); *Greg v. Riordan*, 199 Cal. 316, 33 Pac. 913 (1893). (No objection to assignment for collection to third persons, who take full legal title. The assignee retains equitable title with which the debtor has no concern.); CAL. CODE OF CIV. PROC. §§ 367, 368. See also *Rauers Law & Collection Co. v. Higgins*, 76 Cal. App. 2d 854, 174 P.2d 450 (1946).

⁶ CAL. ADMIN. CODE ch. 7, tit. 16, § 623 forbids any collector to compromise a claim without the authority of the client.

⁷ An assignee of a claim for collection is really a trustee and may not deal with the res as his own without his principal's consent. *Harrison v. Adams*, 20 Cal. 2d 646, 129 P.2d 9 (1942); *Elam v. Arzago*, 122 Cal. 742, 10 P.2d 805 (1932), held the fiduciary relationship of collector to client precludes the collector from obtaining any advantage over the client assignor by misrepresentation or concealment. Here the collector was precluded from taking part in his own claim against the debtor without the consent of the assignor who had to have the benefit of full disclosure of all material facts. CAL. CIV. CODE § 2228 *et seq.*

⁸ Statutes typical of such limitation are embodied in N.Y. PEN. CODE § 275.

client and collector in that regard.⁹ It is often noted that the agency of the collector is not one coupled with an interest since courts tend to require that the interest be in the subject of the transaction itself. However, it may be argued that in consideration of an implied or expressed promise of diligent pursuit of settlement, the collector is given such an interest in the claim; the collector's remuneration being a contingent share of the proceeds. The wording of section 624 of the Collection Agency Code suggests a tacit compromise with that doctrine by making irrevocable an assignment of a claim which is "in the process of collection."¹⁰ If the collector has in fact performed or is performing an implied promise of collection effort, his interest is recognized and protected. While the given *power* to collect may be divested, the collector's *rights* to remuneration are vested, for section 624 provides that upon such a revocation by the client, the contingent fee of the collector becomes payable. This would seem to be a reiteration of the long-standing rule that while a *power* to act for the principal may be terminated, the *rights* of the agency coupled with an interest are indefeasible. A contrary policy would leave the collector subject to unjust exploitation by the client.

California Advisory Board

California by its Collection Agency Statutes codified the thinking of the leading collection industry figures¹¹ in the nation. Those codes, essentially the end-product of the self-policing policies of the industry, have gone far to clarify the client-collector relationship.

Coexistent with the statutory limitation is the California Advisory Board of Collection Agencies,¹² a quasi-legal instrumentality consisting of five members appointed by the governor all of whom are themselves practicing collectors. They are intended to create a liaison between the working problems and practices of the industry and the regulatory functions of the state. Mute testimony to the efficacy of the board and its predecessor is the almost total absence of any recorded litigation on matters it has arbitrated or decided.

⁹ CAL. ADMIN. CODE ch. 7, tit. 16, § 624.

¹⁰ Under Title 16, section 624 of the code, a claim is deemed to be in the process of collection if:

- (a) payment has been received within the six months preceding the client's demand for withdrawal;
- (b) the collector has obtained an enforceable promise of payment in writing from the debtor;
- (c) the collector has filed suit or taken judgment;
- (d) the claim has been forwarded out-of-state for collection;
- (e) payment is assured by the happening of a definite future event, such as the probate of an estate, bankruptcy dividends etc.

¹¹ A brief but concise outline of this history is to be found in California Remedies for Unsecured Creditors, Cont. Ed. of the Bar Series, Chapter 16, by Edward N. Jackson.

¹² CAL. BUS. & PROF. CODE ch. 8 § 6865 *et seq.*; enacted by the 1959 legislature, created this body as the successor to the State Collection Agency Board, whose powers and duties were not clearly defined.

Successive Assignments

Inter-agency conflicts, often involving the arbitration services of the late Collection Agency Board, have occurred in situations where the client has inadvertently, or with indifference to the legal effect, assigned an account for collection to more than one collection agency. Such conflicts of successive assignment have under California holdings been susceptible to resolution on the basis of the "first notice" rule¹³ rather than the so-called "Massachusetts" or "first-in-time" rule. It might be noted that the concept in use is one of multiple *assignees* rather than *agents*. Clearly, on purely agency principles, the subsequent transaction would be a revocation of the prior agency.

The Collector-Debtor Relationship

In General

In sharp contrast to the minimal amount of collector-client litigation, the case reports are abundant with instances of abuse of the collector's tenuous privilege. Courts of the various jurisdictions have been erratic and inconsistent in their legal attitudes towards the collector. The inconsistent measurement of the jural acts of the collector raises a broad area of operative insecurity; a great many "don'ts" make themselves apparent with fewer corresponding "do's." The collector must hop-scotch between the iron-clad laws of economics that dictate his existence and the restriction of local laws. Resultant has been the collector likened to the guilt-ridden child, his hands permissively in the cookie jar and anxious as to the reaction of an erratic parent.¹⁴

Judicial hand-slapping of collection agency activity and related actors has involved the broadest application of criminal and tort law, including battery, assault,¹⁵ blackmail,¹⁶ extortion,¹⁷ invasion of privacy,¹⁸ abuse of

¹³ One who deals with an assignor after notice does so at his peril. *City of Los Angeles v. Knapp*, 7 Cal. 2d 168, 60 P.2d 127 (1936); *Brennan v. Weisbaum*, 77 Cal. App. 129, 245 Pac. 1104 (1926); *In re Kling*, 44 Cal. App. 267, 186 Pac. 152 (1919). As between two bona fide assignees for value, the one who first gives notice to the debtor acquires priority. *Accord*, *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627 (1899); *Rosenblatt v. Credit Discount Co.*, 100 Cal. App. 477, 280 Pac. 181 (1940).

¹⁴ The antipodes of judicial treatment of the collector may be illustrated by *People v. Lovelless*, 84 N.Y. Supp. 1114 (N.Y. Spec. Sessions Ct. 1903), in which the collector sent a letter threatening to expose nonpayment of a just debt and was found guilty under a statute making illegal the sending of letters causing annoyance.

Compare this with *Barton v. State*, 88 Tex. Crim. Rep. 368, 227 S.W. 317 (1921), where the collecting defendant was convicted in the lower court of assault with intent to kill (by a blow with a pistol). Reversed by the higher court for lack of the requisite intent, since "defendant acted alone upon intent to collect the debt which he in good faith believed to be owing."

¹⁵ *State v. Holloway*, 41 Iowa 200 (1875) (Threat to shoot); *Barton v. State*, 88 Tex. Crim. Rep. 368, 227 S.W. 317 (1921).

¹⁶ *State v. Richards*, 97 Wash. 587, 167 Pac. 47 (1917) "[O]ne can commit blackmail although he is of the opinion the money is actually due him."

¹⁷ *Slater v. Taylor*, 31 App. D.C. 100 (1908); *Weeber v. U.S.*, 62 Fed. 740 (C.C. Colo. 1894).

¹⁸ *Biederman's v. Wright*, 322 S.W.2d 892 (1959) (Mo.) An outside collector of a mercantile creditor harassed and embarrassed debtor at her place of employment as a waitress by

process,¹⁹ violation of postal laws,²⁰ breach of federal administrative laws,²¹ unfair competition under Federal Trade Commission prosecution,²² criminal libel,²³ and defamation.²⁴ A recent case awarded a debtor damages for mental suffering and depreciation of the value of his car, stemming out of a wrongful, but not malicious, repossession of his car.²⁵ A California case has even afforded recovery based upon the "happiness" clause of the state constitution.²⁶

Older cases have tended to rest the collector's civil liability upon defamation with many jurisdictions recognizing truth as a defense.²⁷ Ordinarily defamation requires no special damages be shown, but the weight of authority holds that collection cases rest upon whether the bad credit or character so imputed by the collector has injured the debtor's livelihood.²⁸ Under circumstances otherwise constituting *defamation per se*, if the debtor's economic well-being is dependent upon his credit reputation, imputation of bad credit has been held actionable.²⁹ Most jurisdictions have granted a conditional privilege to the collector in contacting the employer³⁰ or another credit agency. The privilege is subject to dissolution upon a showing of bad

conduct described as "loud, overbearing, tough, degrading demands for payment; following her as she went about her duties, threatening to garnish her wages and get her fired from her job." The court rested its decision for the debtor on the right of privacy infringed upon by creditor, regardless of the truth or falsity of the collector's words.

¹⁹ "Abuse of process" as a cause of action is encompassed in Restatement, Torts § 683:

"One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby."

In *Pete v. Norberg*, 163 Cal. App. 2d 154, 329 P.2d 20 (1958), the court made it clear that where a creditor, knowing that wages attached are covered by claim of exemption repeatedly causes a levy to harass, a debtor may recover damages. *Accord*, *Arc Investment Co. v. Tiffets*, 330 Cal. App. 2d Supp. 853, 330 P.2d 305 (1958); *Dean v. Kochendorfer*, 237 N.Y. 384, 143 N.E. 229 (1924).

²⁰ Indication of impaired credit may not appear on the face of any piece of U.S. mail. 18 U.S.C.A. 1718 (1950).

²¹ Federal statutes forbid collection of private debts on government property without prior permission, 44 C.F.R. 100.8, Supp. 1955, pursuant to 40 U.S.C.A. 318 (A) (1950).

²² Federal Trade Commission "Unfair methods of competition" may be invoked where collectors use indicia similar to U.S. government seeking to imply government activities.

²³ *State v. Armstrong*, 106 Mo. 395, 16 S.W. 604 (1891). Creditor held liable for agency exposure of employee's financial circumstances to an employer.

²⁴ Statement in letter to employer that employee "ignored" debt despite collection agency's effort to "secure his cooperation" supports action for defamation without a showing of special damages. *Stickle v. Trimmer* (App. Div. N.J. Superior Ct. June 26, 1958).

²⁵ *Hernandez v. Harson*, 237 La. 389, 111 So. 2d 320 (1959).

²⁶ *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

²⁷ PROSSER, TORTS §§ 95, 96 (1955); RESTATEMENT, TORTS § 582 (a) (1938).

²⁸ *Hudson v. Slack Furniture Co.*, 318 Ill. App. 15, 47 N.E.2d 502 (1943) (telegrapher not libeled per se by publication of false wage assignment).

Liebel v. Montgomery Ward, 103 Mont. 370, 62 P.2d 667 (1936) (stenographer's occupation held not affected by statement: "your credit is N.G." therefore not slanderous per se).

²⁹ *Yelle v. Cowles Publishing Co.*, 46 Wash. 2d 105, 278 P.2d 671 (1955) (words which in themselves prejudice plaintiff in his profession, trade or vocation are libel and slander).

³⁰ *Watwood v. Stones Mercantile Agency*, 194 F.2d 160 (1952); *Miller v. Hone*, 245 Ky. 568, 53 S.W.2d 938 (1932) (held interest of collector was not sufficient to justify contacting the employer).

faith or if the publication of the debt is used as a means of coercion.³¹ Because the potential tort liability of the collector is conceived in the collection process, the collection routine bears examination.

The Collection Process

Most collection agencies receive the listing of assigned claims on a "listing sheet" which, in addition to the debtor's name and last known address, requests the employment of the debtor, the amount and basis of the claim, book account, conditional sales contract, judgment, or other legal justification for dunning on behalf of the assignor.³² Frequently the client will list the claim by telephoning in to the collector the requisite information.³³ All collection agencies in California must keep a file of their clients³⁴ and an "inventory" of claims on hand from each client that are still active and unreturned.³⁵ The newly assigned claim is added to the client's file. In addition the collector creates a file or account card for the debtor³⁶ that indicates all pertinent information supplied by the client and other sources.³⁷

The Initial Debtor Contact

Where the debtor is presumed to be at the address given by the client, collection is usually initiated by a dunning letter³⁸ directed to the debtor's

³¹ An unreported case is noted in the files of the California Division of Collection Agencies where a debtor earning a net income of \$55.00 weekly was threatened with garnishment by a collector who demanded in full a debt of \$250. The collector refused the debtor's offer of installment payments. When the debtor became aware of the wage exemptions, he offered the collector \$27.50 weekly, in lieu of the embarrassment and costs of garnishment. Again, the collector refused. Acting under section 628 of the Collection Agency rules, the Chief of Collection Agencies processed the distressed debtor's complaint, contending that the collector was using oppressive methods to enforce collection and was threatening an abuse of the legal process intended by the wage garnishment statutes. The collector offered no contest and the proceedings were dropped upon the collector's recognition.

³² Section 628 of "the code" limits the types of claims that the collector may handle: "The activities of collection agencies shall be limited to the collection of debts arising out of contracts, express or implied. Any other activities shall be deemed to be the practice of law, and may not be engaged in by licensed collection agencies. . . ." The wording of the same section goes on to clearly disallow the preparation of any legal papers or process, or the handling of claim and delivery (replevin), mechanics liens, or contract damage or tort action matters until reduced to judgment. While the California collector is expressly denied the assignment of tort or other unliquidated claims, the collector is not always free to pursue even a judgment claim under some circumstances. *Pacific Gas and Electric v. Nakano*, 12 Cal. 2d 711, 87 P.2d 700 (1939), held that pending an appeal from a judgment rendered in a tort action the debt represented by said judgment is not subject to garnishment.

³³ *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962 (1904). (An assignment of judgment need not be filed on record); *Smith v. Peck*, 128 Cal. 527, 61 Pac. 77 (1900) (An assignment of judgment need not be in writing); *Mitchell v. Shoreridge Oil Co.*, 24 Cal. App. 2d 382, 75 P.2d 110 (1937) (An assignment may be made orally); *Bruno v. Severini*, 51 Cal. App. 163, 196 Pac. 501 (1921) (No express words are necessary to create an assignment).

³⁴ CAL. ADMIN. CODE ch. 7, tit. 16, § 626(a).

³⁵ *Id.* § 626(d).

³⁶ *Id.* § 626(c).

³⁷ It is common practice in the processing of incoming claims to note any reference to the debtor shown in the current city directory, telephone directories, or closed files of the collector.

³⁸ CAL. ADMIN. CODE ch. 7, tit. 16, §§ 620, 621 impose some general limitations on the tenor of approaching the debtor.

home address.³⁹ This "Number 1" letter, as it is usually called, is commonly a form letter relating no details of the bill except that the client has assigned it to the collector for immediate collection of the amount stated⁴⁰ and that payment in full is expected forthwith. Some letters indicate a tolerance of three to seven days before payment is expected. The collector relies heavily upon the urgent tone of this first communication to elicit payment, promise of payment, or at least a positive contact made by the debtor. Approximately 15% of the first letters produce one of the above responses.⁴¹ Most collectors will send a second and often a third letter; the tone of each is progressively more ominous.

Some California collectors have been known to utilize forms created for or by collectors in other states that threaten the addition of costs, fees, interest, and other penalties to the principal sum. The "code" expressly provides:⁴²

No licensee shall . . . send to any debtor . . . any notice . . . which . . . represents or *infers* that the existing obligation of the debtor may be increased by the addition of attorney fees, investigation fees, service fees, . . . when in fact such fees or charges may not legally be added to the existing obligation of the debtor.

Where the alert debtor challenges the propriety of such an additional charge, the collector will usually correct "the error," and proceed to put the debtor on the defensive as to the true principal balance due.⁴³

The Usury Analogy

The question is presented at this juncture as to why a reasonable anal-

³⁹ A common source of complaint is the dunning letter sent to someone at an address ascertained by the collector different from that supplied by the client, to a person whose name is similar to that of the debtor. Often the collector is "playing a shot in the dark" for want of a definite address, in hopes of arousing some positive response from which he can determine whether the recipient is or is not the intended debtor.

⁴⁰ It is a not-unknown practice in some collection agencies to increase the amount of the claim due, in the first dunning letter by some arbitrary amount, of perhaps 10%. The debtor is likely to immediately respond to the incorrect amount claimed, and in so doing makes contact with the collector who is then in a position to get a commitment from the debtor for full or part payment and at the same time obtain background information. Many debtors, guilt ridden over chronic poor payment habits, will pay any demand made without questioning the specific amount or basis of the bill. To prove this point, one collector made up 50 dunning letters for the bills of an imaginary doctor client and sent them out to names in his closed files, all of whom had a history of bad debts. To even his surprise four replies were received containing either payment or promise of payment. The collector is put in a more favorable "bargaining position" in any compromise of the bill. Obviously a $\frac{1}{2}$ settlement of a \$220 bill will net more than $\frac{1}{2}$ of \$200. The debtor having "gotten away easy" will seldom quibble over the discrepancy in those circumstances. Some collectors retain such overpayment, rationalizing acceptance as "interest," "service charge," or "collection fee." See § 620(d).

⁴¹ According to the American Collectors Association.

⁴² CAL. ADMIN. CODE ch. 7, tit. 16, § 620(d).

⁴³ *Id.* at § 628. "No licensee shall collect or attempt to collect any interest or other charges, fees or expenses incidental to the principal obligation unless such interest or incidental fees, charges or expenses are justly due from and legally chargeable against the debtor or have been judicially determined. . . ." Section 620(d) prohibits any representation that the amount due may be increased by any amount which in fact may not be added to the principal amount legally.

ogy to the usury statutes cannot be found⁴⁴ with a corresponding remedy. Jurisdictions vary in the extent of penalty, but most penalize the usurious creditor by either voiding the entire claim, or allowing a cause of action to the debtor based upon the overcharge.⁴⁵ If public policy will aid one who voluntarily entered into an agreement to repay an amount held to be illegal, why should not that same public policy assist the debtor impressed with a claim to which he *did not* contract? While the code provides a maximum penalty for the offending collector of loss of his license where such wrongful demand has been made, no remedy of direct benefit is afforded to the offended debtor who yielded to the tortious demand. It is suggested here that treble damages, analogous to the California usury remedy, would seem an appropriate solution where a debtor has actually paid over money in response to a demand amounting to an intentional overcharge by a collector.

At present the offender is given the opportunity to repay any such overcharge collected if the matter is publicly challenged, but is otherwise untouched by his wrong. Under most usury statutes the penalties are so extreme in relation to the gain obtained by the wrong that the percentages preclude the risk in attempting the wrong. Such application of usury law would deter this abuse by a collector.

The Collection Follow-Up

The responsive effect of the second and third collection letters are progressively lessened and can be negatively correlated to the "hardness" of the debtor. Delinquent debtors, repeatedly subject to the collection process, are not impressed with *implied* consequences of non-payment; the oft-quoted "severe consequences"⁴⁶ suggested in the collection forms lose their

⁴⁴ There is authority for the finding of usury, and therefore an illegal act susceptible to penalty, by the lender receiving any benefit in excess of a rate permitted by law. *Richlin v. Schleimer*, 120 Cal. App. 40, 7 P.2d 711 (1932); *DEERINGS GEN. LAWS* 3757 § 2.

⁴⁵ Forfeiture of the entire debt for usury is not affected by a statute which provides that any agreement in conflict with the statute shall be void as to any stipulation to pay interest and deferring collection of the debt until full maturity. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 Pac. 956 (1927). But see *Courtney v. Tufeld*, 128 Cal. App. 504, 17 P.2d 613 (1932) (the obligation of the principal amount is not extinguished merely because of the usurious character of the loan; only the interest). *DEERINGS GEN. LAWS* 3757 § 3 (1951) provides for treble damages for the amount of usurious interest taken. See also *Young v. Hillman*, 11 Cal. App. 2d 739, 53 P.2d 733 (1935); *Blodgett v. Rheinschild*, 56 Cal. App. 728, 206 Pac. 674 (1921) (forfeiture of any right to interest in addition to the cause of action for usurious interest taken).

"Usury is the receiving, taking or securing of a greater sum or value for the loan or forbearance of money, goods or things in action than is allowed by law." *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739 (1944); the borrower may recover twice the amount of usurious interest, whether the principal is paid or not. *Yonack v. Emery*, 118 Tex. 224, 13 S.W. 2d 667 (1929); the debtor is entitled to recover back all payment of principal and interest, though contract not usurious at its inception. *Chandlee v. Tharp*, 161 Miss. 623, 137 So. 540 (1931).

⁴⁶ Another unreported case dealt with a Los Angeles collector who mailed the debtor a special oversized letter portraying a bolt of lightning and bearing the caption that unless the bill was paid the consequences would be as devastating to the debtor as if he were the victim of that event of nature. The court evaluated the collectors creativity as being worth \$500 damages to the debtor.

fear-of-the-unknown effect on the debtor, who comes to recognize and destroy the collector's envelope⁴⁷ without opening it.

It becomes necessary, if the amount involved justifies further effort, to attempt direct contact of the debtor.

The economics of the collection agency business have changed, necessitating the handling of more claims more quickly and lessening of the personalized door-to-door dunning by the "outside" collector. The trained telephone collector can contact more debtors in two hours of concentrated phoning than the outside collector could reach in a full workday,⁴⁸ and at a fraction of the cost. With this change has come the awareness that any tortious verbalizations the collector makes by telephone are far less likely to be noted by third parties than where the collector visited the debtor's home or job in the presence of others who might attest to behavior coming within the code. "No licensee shall . . . resort to any oppressive, vindictive, or illegal means or methods of collection."⁴⁹

While it has been held that telephone calls are classified as oral communications and therefore give no basis for an action for invasion of the right of privacy,⁵⁰ that position has not been sustained in the California courts⁵¹ or by most other enlightened courts.⁵² The concept limiting recovery for matters of privacy to written publications unless a showing of special damages is made is relegated to the legal neanderthal.⁵³ It would seem of little consequence which theory the various jurisdictions utilize in fixing

⁴⁷ The words "Excelsior Collection Agency" occupying more than half the envelope was held a violation of postal laws and regulations in *U.S. v. Brown*, 43 Fed. 135 (C.C. Vt. 1890).

⁴⁸ Some time-and-motion oriented collectors run careful control checks on the telephone dunning in their offices. Modern work standards usually require the telephone collector to average one completed call every three minutes. New devices are used in aid of "production" such as phones that leave both hands free to write and file while talking. The American Collectors Association operates regional "Telephone Institutes" of such training and re-education techniques for the benefit of members and their employees.

⁴⁹ CAL. ADMN. CODE ch. 7, tit. 16, § 628.

⁵⁰ *Casin v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947).

⁵¹ *Bowden v. Spiegel*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950) (phoning debtor in the middle of the night at a neighbor's house) *Accord*, *Guillory v. Godfrey*, 134 Cal. App. 2d 633, 286 P.2d 474 (1955); but see: *Vargas v. Giacosa*, 121 Cal. App. 2d, 521, 263 P.2d 840 (1953).

⁵² *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), is a recent leading case in the field of invasion of the right of privacy by a collector. As noted in the syllabus: (1) The right of privacy is the right of a person to be free from unwarranted publicity and to live without unwarranted publicity and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned. (2) An actionable invasion of the right of privacy is the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. (3) A creditor has the right to take reasonable action to pursue his debtor and persuade payment. (4) Such action is not reasonable where a creditor initiates a campaign to harass and torment the debtor, telephones the debtor six or eight times daily at home and place of employment—sometimes at 11:45 P.M.—over a three week period, telephones the debtor's employers and informs them of the debt, and calls the debtor at her employment three times in a 15 minute period with a resultant threat of loss of employment.

See also *Biederman's v. Wright*, 322 S.W.2d 892 (1959) (Mo.).

⁵³ See Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); RESTATEMENT, TORTS § 867; PROSSER, TORTS § 97, p. 641 (1955).

liability, invasion of the right of privacy,⁵⁴ intentional infliction of mental suffering,⁵⁵ or defamation. If the cause of action stems from the collector acting contra to a legally protected interest of the debtor, the courts will act.

Connection with the Judicial Process

Many jurisdictions take the firm position that the collection agency may deal with the claim only so far as the debtor will or will not respond to normal coercive effort.⁵⁶ Should legal action be indicated, the collector may not hire an attorney in the name of the creditor, but rather must return the claim to that client.

The client-collector relationship in California allows the collector to effect collection in his own name as the real party in interest.⁵⁷ However, since in California an assignee is excluded from prosecuting a matter in the small claims court,⁵⁸ nor may any attorney appear in the small claims court,⁵⁹ the collector will return to the client any claims of an amount within the jurisdiction of such court where other collection effort has failed and the amount would not justify entry into the municipal courts. It is seldom that the collector finds feasible entry into the municipal courts on a claim of small caliber.⁶⁰

Some members of the bar have been concerned with the possibility of the collector infringing upon the practice of law in the course of the collection process. No doubt that was in the minds of the legislators in Rhode Island and Alabama where lay collection agencies are outlawed and collection work is restricted to members of the bar. In California "the code" is quite specific in forbidding the collector to prepare any complaint or affidavit, or even to instruct the sheriff as to the details of performing an intended attachment.⁶¹

⁵⁴ *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235 (1955), *Continental Optical v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949). Four states deny the right of privacy (Wisconsin, Texas, Rhode Island, and Nebraska). Twenty states accept an invasion of the right as actionable. The matter is not decisive in the remainder.

⁵⁵ *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932), *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934). In *Bowden v. Spiegel*, 96 Cal. App. 2d 633, 286 P.2d 474 (1955) both theories (invasion of right of privacy and intentional infliction of mental harm) are apparently used to support the decision. See also *In re Associated Lawyers Co.*, 134 App. Div. 350, 119 N.Y. Supp. 77 (1908).

⁵⁶ *Depew v. Wichita Assoc. of Credit Men*, 142 Kan. 403, 49 Pac. 1041 (1935), *Dworken v. Cleveland Retail Credit Men's Co.*, 4 Ohio Bar Ass'n Rep. 399 (1932).

⁵⁷ In *Fingley v. McDonald*, 124 Cal. 682, 57 Pac. 574 (1899), a special agent for a bank with general powers concerning collection of a claim "to act as he deemed best, without consulting us further," delegated duty to plaintiff. The court cited CAL. CIV. CODE § 2349: "An agent can delegate his power to another person . . . when the act to be done is purely mechanical . . . or when such delegation is specifically authorized by the principal."

⁵⁸ CAL. CODE OF CIV. PRO. § 117(f).

⁵⁹ CAL. CODE OF CIV. PRO. § 117(e).

⁶⁰ Filing fees for most municipal courts make litigation of smaller claims prohibitive.

⁶¹ CAL. ADMIN. CODE ch. 7, tit. 16, § 628.

Current Policy vs. Practicality

Practical problems arise from the collector being restricted in following through the collection process. The collector is denied the expedient of relieving his own attorney of the burden of preparing forms involved and even the right to instruct the sheriff as to the desired technique of performing the attachment on assets to secure the action at law.

There is no realistic justification for denying legislative sanction to means of carrying out creditors' remedies already provided by the statute where the possibility of abuse is minimized by the parties involved; the collector and the attorney are responsible parties answerable by bond for any wrongful act stemming from their conduct. It has been argued that the debtor is prejudiced by allowing the collector to direct the sheriff, but the purpose of the attachment statutes is only to secure performance by the debtor of an obligation pending adjudication by the court. To hinder that security defeats the intent of the legislature in providing such a provisional remedy.

Attachment and its Consequences

Where the collector has hired an attorney who sues in the name of the collector, the collector is the principal and is liable for any wrongful attachment. While bonding protection is commonly available against a wrongful attachment, no bond in common use will cover liability for a malicious attachment; the latter being distinguished by a finding of bad faith. In general, there are no statutes that distinguish the collector's powers or rights by attachment or execution from that of any other plaintiff or assignee.⁶²

The collector is susceptible to tort liability for the damages caused by wrongful or malicious attachment and abuse of process.⁶³ This includes slander of title actions and any special damages to the injured plaintiff.⁶⁴ In an unreported case, the collector pursued a claim against a John and Mary Smith at a given address. Public records indicated property at that address owned by a John and Mary Smith with no homestead exemption on file. By mail, the collector demanded payment of the debtors at that address. In due course the collector was contacted by an attorney who stated that he represented the John and Mary Smith at the address given, that they had some time previously purchased the property from *another* John and Mary Smith, and the present Smiths were strangers to any claim held by the collection agency. The unbelieving collector caused an attachment to be laid on the property despite protests by the owners that negotiations were

⁶² The statutory mechanics of attachment are dealt with in the CAL. CODE OF CIV. PRO. § 537 *et. seq.* See also CAL. CODE OF CIV. PRO. §§ 674, 681 *et seq.* (executions).

⁶³ See note 17 *supra*.

⁶⁴ An action for slander of title is based upon a false and malicious statement made in the disparagement of a person's title to real or personal property, resulting in special damages, and is not for defamation of character as in the case of an ordinary action for libel or slander. *Woodard v. Pacific Fruit & Produce*, 165 Ore. 250, 106 P.2d 1043 (1940).

pending for the sale of the property. On the trial it was shown that, in fact, the present owners *were* successors to a couple of the same name. The collection agency, on the facts born of their action, suffered a \$10,000 judgment for slander of title.

Even a proper attachment has been known to involve the collector in misfortune. In *Reachi v. National Auto & Casualty Co.*⁶⁵ the plaintiff brought an action in contract for \$100,000. A bank account in the name of the defendant was found and attached but only \$38 was caught. A motion made by the defendant was successful. The late Justice Carter writing the opinion put forth the holding that since the motion for dissolution of the attachment would not lie, the only remedy available to the defendant was to defend the action. Having done so and been successful in proving the invalidity of the plaintiff's claim, the defendant should be entitled to all costs and damages of the defense, *including attorneys fees*. In this case the plaintiff, notwithstanding his bona fide belief in the propriety of his action, was forced to pay for fourteen days in court for the defendant.⁶⁶

Five years later the same Justice Carter, in *LeFave v. Diamond*,⁶⁷ wrote an opinion that repudiated his position in the earlier *Reachi* case by refusing to extend the *Reachi* rule to the facts where, in a claim and delivery action, bond and redelivery bonds were posted. The defendant prevailed and sued the sureties on the plaintiff's bond relying expressly on the *Reachi* case. Justice Carter held that the *Reachi* case was wrong and should be corrected.

Attachment, garnishment, and other provisional remedies for enforcement of the creditors rights are inextricably bound into the collector's trade whether the collector relies upon his attorney or aims his own collection effort toward specific remedies of the judicial process, such as the search for assets to be later-attached. California has resolved one common law split of authority by determining that an attaching creditor is not a bona fide purchaser as against an unrecorded deed or mortgage. The attachment takes only such interest as the debtor had at the time of the levy.⁶⁸ Nor is an attachment lien an instrument "first duly recorded" within the meaning of Civil Code 1107.⁶⁹ California, in derogation of the old common law which seemed inadequate to the conceptual problems, allows the creditor to reach "all property of the debtor, not exempt by law, or any interest therein." (Emphasis added.)⁷⁰

⁶⁵ 37 Cal. 2d 808, 236 P.2d 151 (1951).

⁶⁶ *Accord*, Clark v. Andrews, 109 Cal. App. 2d 193, 240 P.2d 330 (1952).

⁶⁷ 46 Cal. 2d 868, 299 P.2d 858 (1956).

⁶⁸ *Livingston v. Rice*, 131 Cal. App. 2d 1, 280 P.2d 52 (1955); *Boye v. Boerner*, 38 Cal. App. 2d 567, 101 P.2d 757 (1940).

⁶⁹ CAL. CIV. CODE § 1107. "Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

⁷⁰ CAL. CODE OF CIV. PRO. § 688.

By such terminology the door is opened to satisfying the claim out of equitable interests belonging to the debtor.

Some question arises in attempting to reconcile the interpretation of Code of Civil Procedure sections 542, 543 and 545 by Mr. Justice Nourse in his opinion in *Brainard v. Rogers*.⁷¹ This was an action for goods sold and delivered. Defendant had suffered a fire loss about the time of the commencement of the action and the plaintiff garnished the proceeds in the hands of the insurance company garnishee. It was argued that since the loss had not yet been adjusted, nothing could be caught by the garnishment.

It will be noted that throughout these sections (542, 543 and 545) the expressions "belonging to" and "owing" are used in the disjunctive. But one conclusion can be drawn from this and that is that the legislature intended to authorize the attachment of moneys and other properties which are owing to the debtor as well as money and other properties belonging to the debtor which the garnishee then had in his possession. Looking at the code sections in this light, it follows that moneys which are owing to the debtor, though not yet due, are subject to garnishment because the term "owing" includes an immature as well as a mature obligation.

The court seems to have been remiss in this case in not dealing with the more salient question of whether garnishment will or will not catch unliquidated as well as liquidated amounts in the hands of the garnishee, irrespective of the issue of when the obligation to pay matures in favor of the debtor of the garnishor.⁷²

A distinction between the legal effect of attachment and garnishment is drawn in *The Queen*⁷³ which case comes up on a provision of the La Follette Act⁷⁴ providing that "[N]o wages due or accruing to any seaman or apprentice shall be subject to *arrestment* or *attachment* by any court." (Emphasis added.)

The case points out that, Congress having omitted to exempt the seaman's wages from *execution*, the wages were subject to levy of execution under authority of a state statute. There, it said:

There is a marked difference between an attachment to secure the payment of an asserted, and it may be disputed or unfounded claim, and, the levy of execution which simply seizes upon the property of a debtor for the purpose of satisfying a valid judgment; and my attention has not been called to any case where it has been decided that the wages of any seaman may not be taken on execution issuing out of a state court.

In California attachment and garnishment have been a principal method of enforcement of civil obligations. Metaphorically speaking, they might

⁷¹ 74 Cal. App. 247, 239 Pac. 1095 (1925).

⁷² See: *Dept. of Water & Power v. Inyo Chemical*, 16 Cal. 2d 744, 108 P.2d 410 (1940).

⁷³ 93 Fed. 834 (1899).

⁷⁴ 38 Stat. 1169, § 12 (1915); repealing REV. STAT. § 4536 (1915); *Wilder v. Interisland Navigation*, 211 U.S. 239, 29 S. Ct. 58 (1908) (wages of seamen are exempt from execution); but see CAL. CODE OF CIV. PRO. § 690.10.

be regarded as the corporal punishment to which the debtor-child must be subjected when verbal coercion has failed. While the parent image can usually perform appropriate acts of punishment upon a suitable place on the child, the collector cannot always find his necessary situs: the assets of the debtor.

Exemptions

The collection agency must at times be reminded that the exemptions afforded the debtor under the Code of Civil Procedure⁷⁵ are, with one exception,⁷⁶ matters of procedural defense; not being pleaded or claimed by affidavit, according to the requisites of the particular section involved, they are deemed to be waived by the debtor. Not only must the exemption be claimed, but such assertion must be timely or a laches-like bar to such an assertion becomes operative. In *Boot v. Boyd*⁷⁷ the court said:

Thus it will be observed, Robert A. Boot had almost a months notice of the seizure of his property as commanded by said execution, and that much time within which to have asserted the claim that the property was exempt from execution. As before stated, we think that under these circumstances he should be held to have failed to set up his claim of exemption within a reasonable time, and therefore, waived his right to do so.

The Collector vs. the Bankers Lien Law

Code of Civil Procedure section 542 enunciates the statutory requirements for garnishment including that of bank accounts. The collector will always attempt to ascertain the existence and location of a debtor's bank account. Such knowledge guides the collection effort. It is far easier to talk softly and carry the big stick of knowledge of reachable assets. The super-ego of the collection business is the law of economics: the always-to-be-answered query is whether the claim is collectible and, if so, at what cost? It is impractical for the collector to persist in working a claim where no payment has been forthcoming and there are no known assets with which to satisfy the obligation.

Typical problem: The collector discovers a bank account in the name of the debtor. He verifies a substantial balance⁷⁸ and in short order a writ of attachment is served upon an officer in that branch of the bank pursuant to the formalities required by Code of Civil Procedure section 542. To the surprise of the collector, the sheriff's return shows "no funds." The inter-

⁷⁵ CAL. CODE OF CIV. PRO. §§ 690 *et seq.*

⁷⁶ CAL. CODE OF CIV. PRO. § 690.11 allows the debtor an exemption of one half of all earnings accruing during the 30 days prior to levy, without any necessity of filing a claim of exemption.

⁷⁷ 37 Cal. App. 545, 174 Pac. 352 (1918). See also *Estate of Pillsbury*, 175 Cal. 454, 166 Pac. 11 (1917); *Williamson v. Monroe*, 174 Cal. 462, 163 Pac. 662 (1916); *Stanton v. French*, 83 Cal. 194, 23 Pac. 355 (1889); *Bong v. Parmentier*, 87 Wisc. 129, 58 N.W. 243 (1894) (two months).

⁷⁸ See 14 ALR 2d § 22 as to the invasion of right of privacy in the checking of bank accounts.

vening (and unforeseen) debit was made by operation of the Bankers Lien Law.

A bank "lien" under Civil Code § 3054 on a depositor's account or funds on deposit, is not technically a lien, but is more correctly termed a right of set-off, where the bank is the owner of the fund and the debtor of the depositor.⁷⁹

The set-off mentioned is against any obligation which the debtor-depositor may owe to that bank in any of its branches.

This same case also noted that the right of set-off may be invoked by the bank without the aid of any court. It is self-enforced.

The Collector vs. Community Property

In utilizing the provisional remedies, the collector runs head-on into the community property problem. Upon determination of the status of property, the law is relatively well defined as to what interests are susceptible to the collector's legal remedies.⁸⁰ The difficulty arises in that a husband and wife may agree, without formalities, to a transmutation of the status of the property.⁸¹ How is the unsuspecting collector to know that, in attaching a community property which is liable for the husband's contractual obligation, the husband had previously renounced or disposed of his community interest in the property leaving no interest available for a satisfaction of the creditor? In the absence of evidence of an intended fraud on creditors,⁸² the collector in such a case bears the risk of the consequences of a wrongful attachment. Similarly, where the wife has contracted an obligation for other than necessities,⁸³ only her separate property is liable, and not the community property.⁸⁴

Interest on Claims

The common law approach to collection of interest on the principal obligation leads us to assume that the collector, if the assignee of the claim, will also obtain the right to claim whatever interest is provided for or implied in the original account from date of execution or, if an open account, from date of judgment. Section 625 of "the code" impliedly supports this approach. It requires the collector, if he collects such incidental amounts as interest (or other specified allowable charges), to remit as part of the regular accounting the client's share of such amounts *unless the client authorizes the collector to retain such as additional compensation*. In light

⁷⁹ *Gonsalves v. Bank of America*, 16 Cal. 2d 169, 105 P.2d 118 (1940).

⁸⁰ See note 62 *supra*.

⁸¹ *In re Watkins Estate*, 16 Cal. 2d 793, 108 P.2d 417 (1940).

⁸² *Salveter v. Salveter*, 11 Cal. App. 2d 335, 53 P.2d 381 (1936).

⁸³ Since the husband's duty to support the wife is absolute, both the community property and husband's separate property are liable for necessities furnished to the wife. *Lane v. McAlpine*, 115 Cal. App. 607, 2 P.2d 184 (1931); *Shebley v. Peters*, 53 Cal. App. 288, 200 Pac. 364 (1921).

⁸⁴ But see *Hulsman v. Ireland*, 205 Cal. 345, 270 Pac. 948 (1928).

of this section of the code, some California agencies have by their assignment form provided that all interest collected by the collector accrue to the collector, and where the client in accepting a direct payment from the debtor also collects interest, such interest shall accrue to the client.

In California a judgment carries interest at the rate of 7% per annum from the date of entry⁸⁵ regardless of any greater interest provision in the instrument upon which the judgment is based. In *Troy v. Troy*⁸⁶ the court said:

It is ordinary practice in California to state the amount of the judgment by stating the amount of the principal and the amount of interest, if any, and to give judgment for the combined sums. Thereupon the statute enters in and interest on that judgment runs at 7%.

The original judgment continues to bear interest at 7% to the date of levy regardless of when that levy occurs.⁸⁷ Many collectors utilize the law by recording their judgment in the county where the debtor has, or is likely to acquire, real property⁸⁸ and allow that judgment to quietly accumulate interest. The collector's assignment is protected against subsequent revocation since it is "in the process of collection" as defined by section 624 (c) of "the code." The practical effect is that the collector, on an investment of costs (the attorney usually works for a retainer), may reap the benefit of 7% interest on the gross judgment figure in addition to his customary 50% contingent fee. It is impractical for the collector to foreclose the judgment lien on any and all property found, particularly for relatively small amounts, but the susceptibility to abuse of this avenue of procedure is patent.

The Statute of Limitations and its Avoidances

Situations between collector and debtor arise in which the debtor is given to assert "his rights" under the statute of limitations. The collector, often bolstered by overtones of the omnipotent credit record, is in an excellent position to revive the original obligation. In many cases where the original obligation arose out of an open account that might be disputed or outlawed or to which there are defenses, the collector can sell the debtor into a written acknowledgment of the obligation. By force of the moral obligation, the debtor is persuaded to show good faith by agreeing in writing to pay the collector a liquidated amount.

California will apparently disallow the use of the confession by attorney judgment note.⁸⁹ But the alert collector will utilize the stipulation of judgment form⁹⁰ in conjunction with a written agreement by the debtor to make

⁸⁵ Cal. Const. article XX, § 22.

⁸⁶ 127 Cal. App. 489, 16 P.2d 290 (1932). *Accord*, *Los Angeles Rock & Gravel v. City of Los Angeles*, 132 Cal. App. 262, 22 P.2d 541 (1933).

⁸⁷ *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330 (1907).

⁸⁸ See CAL. CODE OF CIV. PRO. § 674.

⁸⁹ For a discussion of these statutes, see Farabaugh & Arnold, *The Cognovit Note Act*, 5 IND. L.R. 93 (1929). See also Gavit, *The Indiana Note Statute*, 5 IND. L.R. 208 (1929).

⁹⁰ CAL. CODE OF CIV. PRO. §§ 1132-1135.

installment payments of a liquidated sum. The confession allows the collector upon the debtor's subsequent default to have entered a judgment for the amount so stipulated. It should be noted that the obligation then is no longer the original obligation as due to the client, but a *substitution* of one contract for another; something in the nature of a novation.

A distinction must be clearly drawn as to whether the collector has obtained merely an acknowledgment of the original obligation,⁹¹ still within the statute of limitations, or has for a legally recognized consideration created a new obligation running to the collector.⁹² The California Supreme Court said, in *Rodgers v. Byers*:⁹³

It seems to be well settled in this state: 1. that when the statute of limitations has barred the remedy upon the original obligation, and an acknowledgment or promise made after such time is relied upon, the action is not upon the original obligation, but is upon the new acknowledgment, and the implied promise raised by law, or is upon the new express promise. 2. If the acknowledgment or promise be made while the original obligation is legally enforceable, and if no conditions be attached to the promise, then though brought after the statute of limitations otherwise would have barred the remedy against the original obligation, the action is still upon the original obligation, which becomes a "continuing contract" under section 360 of the Code of Civil Procedure, because the bar of the statute has been lifted and removed.

The statute of limitations will run in favor of the debtor only from the date of becoming a California resident, unless the debt was previously barred by the jurisdiction of origin. While there is a presumed requisite intent on the part of the debtor when he enters the state, takes a residence, and accepts employment, if it can be shown that such intent was for a temporary stay and that the original intent was to resume the out-of-state status, the California statute of limitations will not commence to run unless

⁹¹ As to the sufficiency of the acknowledgment, see *Western Coal & Min. Co. v. Jones*, 27 Cal. 2d 819, 167 P.2d 719 (1946); *Outwaters v. Brownlee*, 22 Cal. App. 535, 135 Pac. 300 (1913). In *Steiner v. Davis*, 24 Cal. App. 2d 692, 76 P.2d 157 (1938), it was held that "renewed April 21, 1926—D. D. Davis" (maker) written on the bottom of a promissory note originally executed May 6, 1919, and payable three years from date, was not merely an acknowledgment of the original debt, but had the effect of creating a totally new obligation, thereby sustaining the plaintiffs action commenced on September 1930. The court said, "While the renewal of a note is more commonly accomplished by the giving of a new note, no good reason appears why a note should not be renewed for the same period and upon the same terms by a notation made thereon, if such was the intention of the parties."

⁹² There is no serious question in California that the collectors forbearance to institute suit and enforce the right to collect as a real party in interest constitutes real and valid consideration for the promise of the debtor. *Brownfield v. McFadden*, 21 Cal. App. 2d 208, 68 P.2d 993 (1937); *Pogetto v. Bowen*, 18 Cal. App. 2d 173, 63 P.2d 857 (1936).

⁹³ 127 Cal. 528, 60 Pac. 42 (1900). *Accord*, *Heiser v. McAlpine*, 20 Cal. App. 2d 467, 67 P.2d 141 (1937). See also *Southern Pacific v. Prosser*, 122 Cal. 414, 55 Pac. 145 (1898). *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13 (1897); *Chaffee v. Brown*, 109 Cal. 211, 41 Pac. 1028 (1895); *Biddel v. Brizzolara*, 56 Cal. 374 (1880); *Chabot v. Tucker*, 39 Cal. 434 (1870); *McCormick v. Brown*, 36 Cal. 180 (1868).

and until domicile-seeking intent is shown to have commenced.⁹⁴ The failure of the debtor to sit out the foreign statute in the originating jurisdiction will be of no benefit to him. He must show either a bar in that jurisdiction or that he has accrued the benefits of the California statute as a resident.⁹⁵

Supplemental proceedings

If after taking his judgment the collector cannot locate assets with which to satisfy the debt on execution, the collector may avail himself of the remedy of supplemental proceedings; more specifically the right to have served upon the judgment debtor an order of examination.⁹⁶

Either the debtor⁹⁷ or anyone holding his property or owing credits to the debtor⁹⁸ may be examined under oath; such examination is directed towards making assets available or known for the satisfaction of the judgment creditor. Other witnesses may also be called.⁹⁹ It is in the discretion of the court whether a second or subsequent examination will be allowed.¹⁰⁰ The California Supreme Court has determined that while subsequent examinations could be allowed, the debtor could not be subjected to a second examination without a disclosure by the examining creditor to the court of some material fact of which he was not apprised at the previous examination or matters of like kind.¹⁰¹ The court does not state to what source other than from the desired examination the creditor should look for the information; the only reasonable construction of the court's opinion is that the creditor must show some *good cause* or a change in the debtor's circumstances justifying reexamination of the debtor. This is to protect the debtor from continuing harassment and invasion of privacy.

The Bonding Problem

Many critics of the collection agency regulatory facilities have pointed to the inadequacy of the bonding requirement which, until the last session

⁹⁴ See *Dougall v. Schulenberg*, 101 Cal. 154, 35 Pac. 635 (1895); *Littlepage v. Morck*, 120 Cal. App. 88, 7 P.2d 716 (1932). See also Report, New York Law Revision Committee 139 (1943). As to limitation on rights of out-of-state claims, see CAL. CODE OF CIV. PROC. § 361.

⁹⁵ See *West v. Theis*, 15 Idaho 167, 96 Pac. 932 (1908). See also Report, New York Law Revision Committee 139 (1943).

⁹⁶ An order for appearance of judgment debtor is not appealable. *Rogers v. Wilcox*, 62 Cal. App. 2d 978, 145 P.2d 915 (1944).

⁹⁷ CAL. CODE OF CIV. PROC. § 714.

⁹⁸ *Id.* § 545.

⁹⁹ *Id.* § 718.

¹⁰⁰ *Watson v. Pryor*, 49 Cal. App. 554, 193 Pac. 797 (1920).

¹⁰¹ In *People v. McKamy*, 28 Cal. App. 196, 151 Pac. 743 (1915), the judgment debtor appeared for a second examination but entered objection on the ground that the matter of his property had been fully gone into at the previous examination and no new facts had been shown to the court sufficient to justify the issuance of the second order. This was held to be good ground of objection. *Watson v. Pryor*, *supra* note 100, citing *McKamy* and *McCullough v. Clark*, 41 Cal. 298 (1871), said, "The judgment debtor and creditor are parties to the proceeding. . . . If the parties to such proceeding, as between themselves and their privies are not estopped from again litigating the same matters in another form of action, the whole proceeding would be just a judicial farce, accomplishing no useful end."

of the legislature, required of all licensees a five thousand dollar bond in favor of the Secretary of State. Inflation and the increase of the volume of many collectors leaves their bond covering a fraction of the clients' money handled. By amendment to the Collection Agency Law the five thousand dollar bond requirement is enlarged to ten thousand dollars for and during such time as the licensee has in his employ six or more employees.¹⁰²

While the legislature has taken a step in the right direction, one may continue to question the extent of protection afforded clients of some of the larger collection offices handling sums in excess of \$40,000 each month. Since the code requires remittance only once each 60 days, a defalcating collector could theoretically misappropriate \$80,000 (some of which would be his earned commission).

It has been suggested that the wording of section 6895 admits a construction that the amount of the bond shall run concurrently with the collectors license. The license running from year to year could be interpreted to create a cumulative liability on the surety. Whereas the surety intends to be bound for a maximum penal sum of, say, \$5,000, successive defalcations by the collector over a three year period may create a maximum liability of \$15,000. There exists no recorded test of this possible situation. Until the legislature sees fit to enact a bonding scheme that is realistically related to the exposure of clients' money, we shall have to rely on the solvency of the collector rather than upon a legally enforceable surety device.

Recent Statutory Changes

Many modifications have at various times been suggested for regulation of collection agencies. The last legislature has made some of these changes.

Of principal importance is the transfer to the Department of Professional and Vocational Standards of the administrative machinery governing the collection industry in the state from the office of the Secretary of State. Of special note is the power given under section 6862 to the Chief of the Collection Agency Licensing Bureau to subpoena witnesses in any examination, hearing, or investigation of any licensee.

A totally new series of sections in the Collection Agency Code provides for appointment of a conservator¹⁰³ if the licensee has wrongfully failed to pay a customer or is insolvent. The powers of the conservator are broad and his appointment may be made summarily. The licensee may request a hearing on the action of the director, but the business is meanwhile conducted by the licensee under the direction and control of the conservator.

Conclusion

California has, since the very inception of the collection industry, been the leader. Almost every innovation in the techniques, control, and stand-

¹⁰² Senate Bill No. 1285, BUS. & PROF. CODE § 6895.

¹⁰³ Sections 6904-6904.6 inclusive.

ards of the collection agency have had their origin in this state. While effective legislation and a generally high quality of practitioner has been responsible for the success of the collection agency here, few will admit that the practitioner is free from subjective aberrations of conduct and attempts to press the law to the limit in this state.

As in other fields, the attorney who deals with the collection agency as its legal advisor or on behalf of its adversaries will ultimately be responsible for the practices and ethics of the collector. The collector and the attorney have much to learn from each other.

While some attorneys have been reluctant to delve into the field of creditors rights those that have have generally found much compensation and gratification for their expenditure of time and interest. Many challenging legal problems are dealt with in the collection field as well as a great deal of practical situations calling for the highest degree of tact and experience in dealing with people on all strata of society.